Supreme Court, U.S.
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No. 03 270 AUG 19 2003

IN THE

SUPREME COURT OF THE UNITED STATES

ALABAMA-COUSHATTA TRIBE
OF TEXAS,

Petitioner,

v.

STATE OF TEXAS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This Petition presents two issues:

A. Dicta as Binding. In a 1994 decision, the Fifth Circuit Court of Appeals found that statutes restoring a different tribe (the Ysleta Tribe) to federal status, rather than the Indian Gaming Regulatory Act, governed the Ysleta Tribe's gaming activity and that the federal courts had no jurisdiction to consider the Ysleta Tribe's claims under those restoration statutes. Regardless, operating under the discredited doctrine of hypothetical jurisdiction, the Fifth Circuit remarked that the Ysleta restoration legislation caused Texas gaming law "to operate as surrogate federal law" on tribal land. Given the disapproval by this Court in 1998 of hypothetical jurisdiction, can the Fifth Circuit now rely on this dicta to deny the Alabama-Coushatta Tribe's requested declaration of its gaming rights?

B. Cause for Remand. This Court decided what constitutes "prohibited" gaming on Indian lands in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987) ("*Cabazon*"). The history of the legislation restoring the Alabama-Coushatta Tribe to federal recognition (and also restoring the Ysleta Tribe with materially identical language) contains specific reference to *Cabazon* as controlling Alabama-Coushatta's gaming. Is remand appropriate when dicta in the *Ysleta* decision, now being relied upon to deny Alabama-Coushatta the right to gaming, was wrong?

ALL PARTIES TO THE PROCEEDINGS

The Alabama-Coushatta Tribe of Texas.

The State of Texas.

DISCLOSURE STATEMENT PER RULE 29.6

There is no parent corporation or public company related to the parties in this case.

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PETITION FOR A WRIT OF CERTIORARI

The Alabama-Coushatta Tribe (the "Tribe" or "Alabama-Coushatta") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

No official reports of this case have been published. The District Court decision (App. 9a-28a) and the Fifth Circuit opinion underlying this Petition (App. 3a-6a) are included in the Appendix. The Fifth Circuit considers its unpublished opinions to be binding precedent.

JURISDICTION

The judgment the Tribe seeks to have reviewed was entered in the Fifth Circuit Court of Appeals on April 16, 2003. (App. 3a-6a). The Order denying the Tribe's timely Motion for Rehearing en banc was entered May 22, 2003. (App. 1a-2a). The jurisdiction of this Court is invoked under United States Constitution article III, §2, clauses 2 and 28 and 28 U.S.C. §1254.

STATUTORY PROVISIONS INVOLVED

The statutes at issue in this case are 25 U.S.C. §§731 through 737, collectively referred to as the Alabama-Coushatta Tribes Restoration Act ("Restoration Act"). The entire text of the Restoration Act is included in the Appendix. (App. 46a-52a).

STATEMENT

This case concerns whether the State of Texas (the "State") may permit some gaming within the state, thus regulating rather than prohibiting it, but preclude the Tribe from conducting gaming operations on its own lands based on the Restoration Act which only purports to prohibit gaming on Reservation lands by subjecting such activities "to the same civil and criminal penalties" as provided by Texas state law. Although the grant of injunctive relief requires jurisdiction, the United States Court of Appeals for the Fifth Circuit, based on certain language in an earlier opinion that it lacked jurisdiction, nevertheless affirmed the Memorandum Opinion and Order (App. 9a-28a) of the District Court that the Tribe shut down its gaming operations, which the Tribe had been operating only on its Indian lands, thus depriving the Tribe of its source of revenue. (App. 3a-6a).

Petitioner the Alabama-Coushatta Tribe of Texas is a federally recognized Native American Tribe which was conducting a gaming operation on its own Reservation lands. During the fall of 2001, the Attorney General for the State of Texas, John Cornyn, and state officials under his control, made statements to the press that he would move to shut down any gaming operation on Alabama-Coushatta Indian lands. On November 21, 2001, the Tribe filed in the United States District Court for the Eastern District of Texas pursuant to 28 U.S.C. §1362 and 28 U.S.C. §§ 2201, 2202, an action to seek a declaration of the Tribe's rights, privileges, and opportunities as a matter of federal law (App. 29a-45a). The Tribe sought a declaration that the gaming activities were lawful so long as they were not prohibited by Texas criminal law. *Id.* The Complaint sought to enjoin the State from interfering with the Tribe's governance over gaming activities on Alabama-Coushatta trust lands where

such games were otherwise permitted within the State of Texas or not expressly prohibited. On January 7, 2002, the State filed its answer with a counterclaim alleging jurisdiction under 25 U.S.C. §731 and 28 U.S.C. §1331. The State counterclaimed that the Tribe should be enjoined from any gaming whatsoever occuring on its Indian lands.

During four days of hearings on the State's Motion for Preliminary Injunction, District Court Judge John Hannah, Jr. elevated the matter to trial on the merits. At the close of evidence, and after two rounds of post-hearing briefing, Judge Hannah on June 25, 2002, issued a Memorandum Opinion and Order granting the State's Motion for Preliminary Injunction, and ordered that within thirty days the Tribe cease and desist operating, conducting, engaging in, or allowing others to operate, conduct, or engage in, gaming and gambling activities on the Tribe's reservation which violate state law. (App. 9a-28a). On July 17, 2002, the District Court issued orders denying the Tribe's motions for reconsideration and for stay pending appeal, and entered Final Judgment. (App. 7a-8a). The District Court concluded that the Tribe's gaming activities are illegal pursuant to the Restoration Act. (App. 21a and 25a). The District Court held that Texas law is surrogate federal law, preventing the Tribe from governing its own gaming activities (App. 25a), without regard to the fact that others in the State, namely the Texas State Lottery, can operate the exact same games at issue, pursuant to Texas law. *See Tex. Gov't Code Ann.* §466.101 et seq. (Vernon 2003).

On October 24, 2002, the Tribe was forced to cease all gambling activities on its Reservation. The Tribe appealed from the June 25, 2002 Memorandum Opinion and Order and from the July 17, 2002 Final Judgment.

On appeal to the Fifth Circuit, the District Court Order was affirmed; the appellate panel concluded it could not grant relief without deviating from its decision in *Ysleta del Sur Pueblo v. State of Texas*, 36 F.3d 1325 (5th Cir. 1994) ("*Ysleta*"), thus affirming the injunction based on a case finding a lack of jurisdiction. The panel was concerned with this result: "However sympathetic we may be to the Tribe's argument, we may not reconsider *Ysleta*, even if we believed that the case was wrongly decided." (App. 5a-6a). The Tribe is thus left with no avenue for relief other than this Petition.

REASONS FOR GRANTING THE PETITION

A. Summary of Argument

In the early 1990s, the Ysleta del Sur Pueblo (the "Ysleta Tribe") sought negotiations for a tribal-state gaming compact with the State under the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. §§2701 *et seq.* When the State refused, the Ysleta Tribe sued. The United States District Court for the Western District of Texas held that the State was required to negotiate, and neither the Johnson Act nor the legislation restoring the Ysleta Tribe to federal recognition prohibited the types of games the Ysleta Tribe was proposing to operate. *Ysleta del Sur Pueblo v. State of Texas*, 852 F.Supp. 587 (W.D. Tex. 1993); (App. 77a-100a).

The Fifth Circuit reversed this decision finding that the Ysleta Tribe's gaming rights were governed by the Ysleta del Sur Pueblo's Restoration Act and not governed by IGRA, and further reasoned that the District Court could not have jurisdiction because, unlike IGRA, the Restoration Act did not include provisions abrogating the State's Eleventh Amendment immunity. *Ysleta*, 36 F.3d 1325 (5th Cir. 1994); (App. 53a-76a). Despite

ruling that the District Court lacked jurisdiction, the Fifth Circuit also opined that statutes restoring the Ysleta Tribe to federal recognition: (1) embodied any gaming compact the Ysleta Tribe was entitled to, (2) were not enacted with an intent to follow this Court's analysis in *Cabazon* regarding what is, and is not, prohibited gaming on Indian reservations, and (3) caused Texas gaming law to operate as surrogate federal law on the Ysleta Tribe's reservation. *Id.*

In the proceedings underlying the litigation at issue here, the Alabama-Coushatta Tribes sued for a declaration that the Tribe is entitled to conduct such gaming as would be allowed pursuant to this Court's *Cabazon* analysis under the statutes restoring it to federal recognition. These statutes are materially identical to those involving the Ysleta Tribe. They were codified separately, but were a part of the same legislation. The Fifth Circuit relied upon its dicta in *Ysleta* to preclude any further consideration of Alabama-Coushatta's arguments, despite the introduction of additional evidence in the District Court establishing that the Fifth Circuit interpretation of the Restoration Act in *Ysleta* was wrong.

Alabama-Coushatta was not a party to the *Ysleta* case. Its arguments were not considered in that case. Its issue was not presented - the Ysleta Tribe sued for an enforcement of its rights under IGRA whila Alabama-Coushatta seeks only confirmation that the *Cabazon* analysis applies to its conduct of gaming. Regardless, dicta from *Ysleta* has caused the Fifth Circuit to affirm an enjoining of Alabama-Coushatta's gaming operation. (App. 5a-6a). This case thus presents an extension by the courts below of the doctrine of hypothetical jurisdiction, which this Court has discredited, to Alabama-Coushatta's great harm.

The situation this application of dicta causes is inequitable and does not otherwise lead to the same result as application of the *Cabazon* analysis. The State permits

gaming. The State itself operates a lottery. It permits other gaming, including gambling at horse and dog tracks. Another tribe which exists within the exterior boundaries of the State, the Texas Kickapoo, operates a casino on its lands.

There is value to a remand of this case for a merits consideration of Alabama-Coushatta's underlying arguments. The dicta relied upon below is wrong. The Fifth Circuit has interpreted the relevant statutes in a manner inconsistent with the legislative history. Senator Morris Udall, commenting on the final version of the legislation restoring both the Ysleta Tribe and Alabama-Coushatta to federal recognition, stated:

> [T]he Senate amendments to these sections are in line with the rationale of that recent Supreme Court decision in the case of *Cabazon Band of Mission Indians v. California.* This amendment in effect would codify for these tribes the holding of a rational [sic] adopted in the Court's opinion in the case.

133 Cong. Rec. H6975 (daily ed. Aug. 3, 1987) (statement of Rep. Udall).

Ysleta incorrectly interprets the relevant statutory language by failing to correctly examine the legislative history or apply commonplace rules of statutory construction. Remand is thus appropriate for Alabama-Coushatta to be able to further brief and argue these points and for the courts below to further consider them without the influence of improper dicta. Under no circumstances should Alabama-Coushatta be bound to the result in *Ysleta* where the court in that case was hypothecating on rights of a separate tribe despite deciding that it did not have jurisdiction to hear the case.

B. A Determination of Alabama-Coushatta's Rights to Conduct Gaming Should Not Be Controlled by Dicta from a Case in Which the Fifth Circuit Was Opining Only Under Hypothetical Jurisdiction.

Under Supreme Court Rule 10(a), review is appropriate where a United States Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power. Supreme Court Rule 10(c) also establishes that review is appropriate where a United States Court of Appeals has decided an important federal question in a way that conflicts with relevant decisions of this Court. Those circumstances are present here. Specifically, the courts below ignored the admonishment of this Court that appellate courts are not to base decisions on dicta where the prior decision engages in hypothetical jurisdiction and opines on the meaning of a statute not properly before the court. *See Steel Co. v. Citizens for a Better Environment,* 523 U.S. 89 (1998). The underlying dicta also misapplied traditional canons of statutory interpretation to a statute intended to embrace, rather than burden, the federal government's historic and judicially sanctioned trust responsibility to tribes.

In 1998, this Court rejected the notion of "hypothetical jurisdiction," whereby appellate courts sidestep jurisdictional issues to address the merits of a case:

> We decline to endorse such an approach because it carries the courts beyond the bounds of authorized judicial action and thus offends fundamental principles of separation of powers. This conclusion should come as no surprise, since it is reflected in a long and venerable line of our cases. "Without

> **jurisdiction the court cannot proceed at all** in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause."

Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 94 (1998) (emphasis added) (*quoting Ex Parte McCardle*, 7 Wall. 506, 514, 19 L.Ed. 264 (1868)). *See also In re the Dep't of Energy Stripper Well Litigation*, 206 F.3d 1345, 1351 (10th Cir. 2000) (characterizing anything beyond jurisdictional dismissal as dicta). *Steel* and its progeny affirm that federal courts must first address whether they have jurisdiction. Once it is resolved that there is no jurisdiction, the court's authority to address the merits ends.

The holdings in the courts below in this matter rely, in their entirety, on the 1994 *Ysleta* decision of the United States Court of Appeals. The Fifth Circuit in *Ysleta* found that it lacked jurisdiction to hear the case. Yet, it went forward and opined on the merits. This dicta is now used to deprive Alabama-Coushatta of the opportunity to conduct gaming otherwise allowed by law.

The *Ysleta* court ruled that the Ysleta Restoration Act, 25 U.S.C. §1300g *et seq.*, rather than IGRA, governs the Ysleta Tribe's gaming activities, and therefore the district court, which had ruled entirely in favor of the Ysleta Tribe, did not have jurisdiction to hear the case. The appeals court in *Ysleta* held that since the Ysleta Restoration Act did not contain a congressional waiver of, and the State did not waive, Texas' Eleventh Amendment immunity from suit, the court was without jurisdiction to hear the matter and the case was remanded for dismissal. 36 F.3d at 1335-36.

Unfortunately, the *Ysleta* decision went further and included several passages as to what the panel thought the scope of gaming on the Ysleta Reservation would be if, hypothetically, the lower court had jurisdiction:

> Congress did not enact the Restoration Act with an eye towards *Cabazon Band.* Congress was merely acceding to the [Ysleta] Tribe's request that the tribal resolution be codified.

Id. at 1333-34.

> [U]pon reviewing these materials, we are left with the unmistakable conclusion that Congress – and the [Ysleta] Tribe – intended for Texas gaming laws and regulations to operate as surrogate federal law on the Tribe's reservation in Texas.

Id.

> [T]he [Ysleta] Tribe has already made its "compact" with the State of Texas and the Restoration Act embodies that compact.

Id. at 1335.

The *Ysleta* panel lacked jurisdiction to opine on what the language of the Restoration Act meant. The panel's analysis is pure dicta. This Court recognized in *Steel* the practice of appellate courts in addressing the merits of a claim prior to addressing the jurisdictional issues and adminished against such an approach:

> "On every writ of error or appeal, the first and fundamental question is that of jurisdiction, first, of this court, and then of the court from which the record comes. This question the court is bound to ask and answer for itself, even when not otherwise

> suggested, and without respect to the relation of the parties to it." The requirement that jurisdiction be established as a threshold matter "spring[s] from the nature and limits of the judicial power of the United States" and is "inflexible and without exception."

Steel, 523 U.S. at 94-95 (citations omitted).

The Fifth Circuit cannot raise dicta to the level of precedent through the use of hypothetical jurisdiction, which is precisely what it did when opining on the meaning of the gaming passages in the Restoration Act. This Court in *Steel* states:

> Hypothetical jurisdiction produces nothing more than a hypothetical judgment – which comes to the same thing as an advisory opinion, disapproved by this Court from the beginning. *Muskrat v. United States*, 219 U.S. 346, 362 (1911); *Hayburn's Case*, 2 Dall. 409 (1792). Much more than legal niceties are at stake here. The statutory and especially constitutional elements of jurisdiction are an essential ingredient of separation and equilibrium of powers, restraining the courts from acting at certain times, and even restraining them from acting permanently regarding certain subjects. *United States v. Richardson*, 418 U.S. 166, 179 (1974); *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 227 (1974). **For a court to pronounce upon the meaning** or the constitutionality **of a state or federal law when it has no jurisdiction to do so is, by very definition, for a court to act ultra vires.**

Fundamental to American jurisprudence is the limiting of precedent to actual and necessary holdings of a court decision and recognizing that dicta or *obiter dictum*

is not binding. *Cuquenan v. Guardian Life Ins. Co. of America,* 511 U.S. 375, 379 (1994) ("it is to the holdings of our cases, rather than their dicta, that we must attend"). In applying these standards to the holding of *Ysleta,* the holding must be limited to its jurisdictional dismissal. The remainder of the case is dicta grounded only on the court's hypothetical jurisdiction. Only two precedential points may be gleaned from *Ysleta:* (1) the Restoration Act and not IGRA applies to the gaming operations of the Ysleta Tribe; and (2) the Restoration Act alone did not waive Texas' Eleventh Amendment immunity from suit. Everything else in *Ysleta* is non-binding dicta. Alabama-Coushatta's case on the gaming provisions of the Restoration Act was not properly before the Fifth Circuit in *Ysleta.* Accordingly, the District Court's and Fifth Circuit's reliance on this discussion as the basis for their rulings below was improper and should be overturned by this Court.

The Ysleta Tribe's claims in 1993 were made pursuant to IGRA. *Ysleta del Sur Pueblo v. State of Texas,* 852 F.Supp. 587, 589 (W.D. Tex. 1993). It is without dispute that the Ysleta Tribe's claims were not made pursuant to the Restoration Act. On appeal, the *Ysleta* panel found that the district court lacked jurisdiction to hear the Ysleta Tribe's claims under IGRA. 36 F.3d at 1327. However, the *Ysleta* court went on to illustrate the infirmities of the claim pursuant to the Restoration Act. *Is.* at 1328-37. The discussion, by its very nature, did not address the controversy before the court. Accordingly, the Fifth Circuit's *Ysleta* language, upon which the courts below in this matter relied, is not controlling. The District Court and the Fifth Circuit panel hearing this Alabama-Coushatta case were free to render (and should have rendered) their decisions regarding the Tribe's claims without regard to the dicta in *Ysleta.*

The courts below, by binding themselves to the *Ysleta* decision, have perpetuated the sort of injustice that underscores this Court's admonishment against appellate courts engaging in hypothetical jurisdiction. The Fifth Circuit panel in this litigation recognized the injustice: "However sympathetic we may be to the Tribe's argument, we may not reconsider *Ysleta* even if we believed that the case was wrongly decided." (App. 5a-6a). This Court should remedy this injustice and require that the adjudication of these important tribal rights be based on the controversy before the court and not on the dicta of a case to which the Tribe was not a party.

C. The Fifth Circuit's Dicta in *Ysleta* Was Wrong and Remand of this Case Will Allow Alabama-Coushatta to Present, and Will Require the Court Below to Consider Without Being Influenced by Improper Dicta, All Evidence and Arguments on the Restoration Act.

Remand of this case will be fruitful. It will allow full appellate consideration of Alabama-Coushatta's arguments and evidence regarding the proper interpretation of the legislation restoring it to federal recognition. It will allow the courts below to consider the merits and rule on them in a case where they have actual jurisdiction without the improper influence of *Ysleta* dicta. It will allow a correction of the inequities caused by blind reliance on *Ysleta*.

The voluminous dicta set forth in *Ysleta* cannot withstand scrutiny. At the crux of understanding the *Ysleta* court's error are four events in the spring and summer of 1987. First, the Restoration Act (H.R. 318) was introduced into the House of Representatives with the following language prohibiting all forms of gaming:

> Sec. 207. (a) Gaming, gambling, lottery or bingo as defined by the laws and administrative regulations of the State of Texas is hereby prohibited on the Tribe's reservation and on tribal lands. (b) Whoever violates the provisions of subsection (a) of this section shall be fined not more than $10,000 or imprisoned not more than two years, or both. (c) Nothing in this section shall be construed as a grant of civil regulatory jurisdiction to the State of Texas.

133 Cong. Rec. H111 (adopted by the Senate on September 25, 1986 as H.R. 1344, 132 Cong. Rec. S13636).

Second, on February 25, 1987, this Court issued its landmark decision confirming the inherent sovereign right of an Indian tribe to self-govern gaming activities on its Indian lands which are not criminally prohibited by state law, stating:

> [T]he Court of Appeals drew a distinction between state "criminal/prohibitory" laws and state "civil/regulatory laws" if the intent of a state law is generally to prohibit certain conduct, it falls within Pub. L. 280's grant of criminal jurisdiction, but if the state law generally permits the conduct at issue, subject to regulation, it must be classified as "civil/regulatory" and Pub. L. 280 does not authorize its enforcement on an Indian reservation.

California v. Cabazon Band of Mission Indians, 480 U.S. 202, 209 (1987).

Third, on July 23, 1987, the Senate struck the language to section 207 as introduced and replaced it with the following language, which abandons the outright ban of the previous version and instead only limits gaming to that which is not "prohibited" by State law. Much of this language is lifted directly from the *Cabazon* opinion:

SEC. 207. GAMING ACTIVITIES.

(a) IN GENERAL. All gaming activities which are prohibited by the laws of the State of Texas are hereby prohibited on the reservation and on lands of the tribe. Any violation of the prohibition provided in this subsection shall be subject to the same civil and criminal penalties that are provided by the laws of the State of Texas. The provisions of this subsection are enacted in accordance with the tribe's request in Tribal Resolution No. T.C.-86-07 which was approved and certified on March 10, 1986.

(b) NO STATE REGULATORY JURISDICTION. Nothing in this section shall be construed as a grant of civil or criminal regulatory jurisdiction to the State of Texas.

H.R. 318, 100th Cong. First Session (1987); 133 Cong. Rec. S10568-03.

Fourth, on August 3, 1987, the House provided unanimous consent to concur with the Senate Amendment after Interior and Insular Affairs Committee Chairman Morris Udall, whose Committee had jurisdiction over the Restoration Act, stated to the full House:

> The Senate amendment makes changes to sections 107 and 207 of the [Restoration Act]. These sections deal with the regulation of gaming on the respective reservations of the two tribes. It is my understanding that **the Senate amendments to these sections are in line with the rationale of the recent Supreme Court decision in the case of Cabazon Band of Mission Indians versus California. This amendment in effect would codify for these tribes the holding and rational [sic] adopted in the Court's opinion in the case.**

133 Cong. Rec. H6972-05 (daily ed. Aug. 3, 1987) (statement of Rep. Udall) (emphasis added).

Not present in the record in prior cases involving the Ysleta Tribe, the trial in this matter included uncontroverted testimony of the three key Congressional staffers familiar with the Congressional deliberations of tribal governmental gaming in general, and deliberation of the Restoration Act, specifically, and intimately familiar with the rules, procedures, and policies of Congress at the time the Restoration Act was enacted. Transcript of Hearing, April 2, 2002, Docket 20, Testimony of Prof. Alex Skibine at pages 109-68, Testimony of Virginia Boylan at pages 169-85, and Testimony of Frank Ducheneaux at pages 286-302. Their testimony, and a review of the written legislative history, demonstrates that the Senate amendments were specifically crafted to protect the Tribe, and that the Senate amendments establish a clear rejection of the proposed concessions advocated by certain Texas officials and written into the legislation prior to amendment by the Senate.

Ysleta correctly sets forth this Court's determination in *Cabazon* that state law is criminal "if it generally *prohibits* certain conduct but a state law is civil, and presumptively inapplicable if it *regulates* the conduct at issue." *Ysleta,* 36 F.3d at 1330. But that is only a partial summary of the analysis. This Court completed the analysis by holding that enforcement of a regulatory scheme by criminal penalties does not convert a civil/regulatory scheme into a criminal/prohibitory scheme. *Cabazon,* 480 U.S. at 211-12. Indeed, the Restoration Act's provision in section 207(b) retaining the Tribe's "civil or criminal regulatory" jurisdiction reinforces the conclusion that section 207 (25 U.S.C. §737), as amended by the Senate, was specifically crafted to

embrace the *Cabazon* decision. A review of federal statutes does not reveal the term "civil or criminal regulatory jurisdiction" in any legislation prior to the issuance of the *Cabazon* decision.

Ysleta asserts: "[I]n considering the Restoration Act, Congress clearly was concerned with enacting the compromise between the Tribe, the State and various members of the Texas congressional delegation." 36 F.3d at 1333. That statement is mostly true in that language imposing a total ban on gaming was discussed regarding all versions of the legislation **prior** to the Senate amendments to the legislation. That statement is **entirely not true** regarding the language in the Senate amendments. Indeed, rejection of the prior language evidences a fundamental shift in the conerns of Congress. Such a fundamental shift was appropriate in the wake of the *Cabazon* decision. The "compromise" was embodied in the language introduced in the House; the "compromise" was rejected by the Senate's amendments. No legislative history can be presented by the State or cited by the Fifth Circuit which remotely suggests that the "compromise" had any force after the Senate's rejection of the House language.

Ysleta asserts that the Restoration Act's reference to enforcement by civil penalty is at odds with *Cabazon*. The panel missed the point. *Cabazon* stands for the proposition that a civil/regulatory scheme may be enforced by criminal, as well as civil, penalties:

> [T]hat an otherwise regulatory law is enforceable by criminal as well as civil means does not necessarily convert it into a criminal law within the meaning of Pub. L. 280.

Cabazon, 480 U.S. at 211. It follows that a criminal/prohibitory scheme may be enforced by civil, as well as

criminal, penalties. Indeed, lesser penalties for classes of offenders or non-repeat offenders are common in criminal/prohibitory enforcement schemes.

Ysleta dismisses Congresman Udall's statement as "just one representative that was recited at the twelfth hour of the bill's consideration." 36 F.3d at 1334. At all times during the consideration of the Restoration Act legislation (H.R. 1344 and H.R. 318), Congressman Morris K. Udall was Chairman of the Committee on Interior and Insular Affairs of the U.S. House of Representatives. Transcript of Hearing, April 2, 2002, Docket 20, Testimony of Frank Ducheneaux ("Ducheneaux Testimony") at pages 286-302. In the House, this committee had general jurisdiction over most Indian legislation and affairs and had exclusive jurisdiction over H.R. 1344, H.R. 318, and all of the Indian gaming legislation. *Id.*

From the 96th Congress through the 101st Congress, there was no subcommittee for Indian affairs on the Interior Committee. *Id.* This jurisdiction was held within the full Committee. *Id.* All Indian legislation referred to the Committee was under Chairman Udall's direct management as was the Indian affairs staff. *Id.* As Chairman of the Committee, Mr. Udall had a duty under the rules of the House to bring H.R. 1344 and H.R. 318, as reported, to the House for action. *Id.* As Chairman, he managed the successful floor consideration of H.R. 1344 in the 99th Congress and H.R. 318 in the 100th Congress. *Id.* The Senate passed the bill, with the amendment language at issue here, on July 23, 1987. 133 Cong. Rec. S10568-03. On August 3, 1987, the House concurred in the Senate amendments. 133 Cong. Rec. H6972-05. It was during the act of the House concurrence that Mr. Udall made the quoted statement. *Id.*

On July 23, 1987, the Senate returned to the House H.R. 318 with Senate amendments thereto and it was received in the House on July 24, 1987. 133 Cong. Rec. S10568-03.

Under the rules of the House, the House at that point could have:

(1) Referred the bill back to the Committee on Interior and Insular Affairs;

(2) Concurred in the Senate amendments;

(3) Concurred in the Senate amendments with a further amendment and sent it back to the Senate; or

(4) Disagreed with the Senate amendments and requested a conference

Ducheneaux Testimony.

Under the rules of the House and Senate, only the Chairman of the committee of reference or his designee had authority, and would have been recognized, to offer a motion to ask unanimous consent to do any of those four things. *Id.* A committee chairman would elect option (1), (3), or (4) if the bill as amended by the Senate were unacceptable. A committee chairman would only elect option (2) if he found the Senate amendments to the bill to be acceptable.

The chairman's power in this regard is a substantial one. Only he had a right to, and only he would have been recognized to, call the bill up. *Id.* When Rep. Udall made his unanimous consent request, the Ranking Minority (Republican) member of the Interior Committee or his designee undoubtedly reserved the right to object so that Chairman Udall could give an explanatory statement. *Id.* Thus, the statement that he made that day was not just "his personal understanding" of the meaning of the Senate's amendments to the gaming provisions.

Mr. Udall was Chairman of the Committee with jurisdiction over the bill, and he was the floor manager of the bill. His consent was necessary for the House concurrence in the Senate amendments. *Id.* He would not have given it if he did not fully understand the meaning of the amendments and if he did not intend them to have the meaning he assigned to them. The analysis in *Ysleta* suggests that 434 members gave unanimous consent, believing Congressman Udall was speaking gibberish about the Senate amendments' effect. Far from the twelfth-hour comments, the express reference to the *Cabazon* decision was made at the singular opportunity to address the House floor when seeking unanimous concurrence to the Senate amendments.

Basic canons of statutory construction militate in favor of construing the Restoration Act and *Cabazon* harmoniously. Section 207 of the Restoration Act was changed from an outright unequivocal ban on all forms of gaming to a version that merely precludes gaming that is "prohibited" in Texas. Even in the absence of Rep. Udall's statement that the change was intended to incorporate the "criminal/prohibitory" distinction from *Cabazon,* canons of statutory construction required the District Court to presume that Congress was aware of the judicial interpretation and that the statute incorporated it. *See Merrill Lynch v. Curran,* 456 U.S. 353, 382 n.11 (1982).

Likewise, the Senate's amendment of the bill is presumed to reject the prior language banning all forms of gaming by tribes. *See Russello v. United States,* 464 U.S. 16, 23-24 (1983). Rather than presuming that the two versions were meant to perform the same role, the District Court was bound (in the absence of any evidence to the contrary) to determine what purpose the Senate

amendments were intended to effectuate. The District Court's contention that the change was meaningless is contrary to the rules of construction and common sense.

Finally, rules of construction favoring Indian tribes would dictate against the finding that the Restoration Act was intended to apply Texas civil jurisdiction to the Tribe. Congress is required to employ clear and unequivocal language when it terminates tribal sovereign rights. *See Mattz v. Arnett,* 412 U.S. 481, 504 n.22 (1973). In this case, Congress' purported application of Texas civil jurisdiction over the Tribe is such a radical departure from the established relationship among Indian tribes and the state and federal government that the vague language of section 207 is insufficient to accomplish this purpose. In addition, all statutes affecting Indian rights are to be liberally construed with doubtful expressions resolved in favor of the tribes. *See Minnesota v. Mille Lacs Band of Chippewa Indians,* 526 U.S. 172, 195 n.5 (1999).

The Fifth Circuit and the District Court deliberating on the rights of Alabama-Coushatta both erred in relying on the dicta set forth in *Ysleta.* That dicta is based on improper hypothesizing of what the decision would be if the court had jurisdiction. That dicta is poor analysis resulting in a wrong decision and an inequitable situation. The dicta of the *Ysleta* decision has been improperly used by the State of Texas against the Alabama-Coushatta to accomplish the political objective rejected by the Senate amendments to the Restoration Act.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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